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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Billed Party Preference for InterLATA 0+ Calls	)	**CC Docket No. 92-77**
	)	

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS COMMENTS OF AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA")

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America's Carriers Telecommunication Association ("ACTA")[1], by its attorneys, hereby submits comments concerning the Regulatory Flexibility Act ("RFA") Analysis concerning the Commission's Second Further Notice of Proposed Rulemaking ("Notice") in the above-referenced docket proposing a modified combination of alternatives to Billed Party Preference ("BPP").[2]

I. INTRODUCTION

ACTA continues to support the views expressed by many competitive interexchange carriers ("IXCs") and others that the costs of BPP substantially outweigh any potential benefit to customers.[3] In addition, ACTA submits that the concerns which prompted consideration of BPP have been addressed and can be even more effectively addressed in meritorious cases by enforcement of the provisions of TOCSIA, the Commission's implementing regulations, and by a joint Commission/industry effort to improve consumer information.

However, ACTA submits that the Commission's benchmark proposals and oral disclosure cannot pass RFA muster. Rather, ACTA submits that a price disclosure requirement for all 0+ calls would provide consumers with the information necessary to make informed choices, and do away with the need for benchmark rates and oral disclosure requirements.

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[1] ACTA is a national trade association representing interexchange carriers, some of which provide tariffed intrastate and interstate 0+ services throughout the United States.

[2] See, In the Matter of Billed Party Preference for InterLATA 0+ Calls, *Second Further Notice of Proposed Rulemaking*, CC Docket No. 92-77, June 6, 1996, ¶3 (hereinafter "Second Further Notice").

[3] See, e.g., Comments of One Call Communications d/b/a OPTICOM, CC Docket No. 92-77, submitted April 12, 1996 at 2-4 (hereinafter "Opticom Comments"); Reply Comments of One Call Communications, Inc. d/b/a OPTICOM, CC Docket No. 92-77, submitted April 27, 1995 at 2.

II. THE BENCHMARK RATE PROPOSAL DOES NOT COMPLY WITH THE RFA BECAUSE IT WILL LEAD TO ANTI-COMPETITIVE AND DISCRIMINATORY RESULTS.

In its Notice, the Commission proposes the adoption of benchmark rates, which would be based upon "consumer expectations." OSPs whose rates exceed the "benchmark" by a certain percentage would be required to make oral disclosures of this fact.[4] ACTA cannot help but to view the benchmark proposal as an affront to smaller carriers everywhere. The Commission's intent to rely on the Big Three's rates to establish publicly acceptable rates is simply unsound. The proposal ignores the different underlying costs borne by smaller carriers and the economic disparities which exist between the Big Three carriers and all other OSPs.

The benchmark proposal will create two groups of carriers: the Big Three carriers who are able to charge at or below the benchmark rates; and all other smaller carriers, who by being forced to charge the benchmark rates, will not be able to recover their costs. For small providers, the problem is particularly severe because they can only recover their costs directly through rates charged to consumers, while the Big Three may recover their costs through such means as cross-subsidization and arbitrary cost allocations, made all the more possible because of their multi-market operations.

To add to the unevenness, given the certainty that smaller providers' underlying costs will be greater in all cases, all smaller OSPs will be subjected to the oral disclosure rules proposed by the Commission.[5] Hence, with all or most small carriers required to make oral disclosures, the

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4 Second Further Notice, ¶3.

5 Second Further Notice, ¶35.

Commission has ensured that the public will be conditioned to associate small providers with excessive rates.[6] The consequences in the marketplace for smaller OSPs will be severe.[7] OSPs will be forced to charge rates below the Big Three benchmark rates in order to get consumers to utilize their services. Because rates set below the benchmark will not allow these carriers to recover their costs, plus a reasonable profit, the Commission's proposal has a confiscatory effect and the already competitively disadvantaged smaller OSPs will be unable to sustain themselves in the marketplace.

The primary objective of TOCSIA was to allow all legitimate companies to compete in the marketplace.[8] Moreover, Congress has consistently shown its concern that small business be able to participate as competitors in the industry. But no business can survive if not permitted to recoup its costs associated with doing business.[9] The Commission's proposal therefore conflicts with both the broad general policies seeking greater participation by smaller companies in competing in the OSP market, and with the more specific policy the Commission must apply in terms of its RFA analysis.

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[6] Consumers will not discern the slight difference in a rate quote versus that of a benchmark carrier's. The caller will simply associate the presence of the announcement with excessive rates and ignore whether the minimal difference in price would be acceptable to the caller. Without a rate brand on all 0+ calls, the caller will never know that the difference in price is small.

[7] The Commission's having selected AT&T, MCI and Sprint as the benchmark companies, means that these companies will never be forced to rate brand, regardless of the rates they charge consumers.

[8] H.R. Rep. No. 213, 101st Cong., 1st Sess. (1989).

[9] The Commission states its belief that a disclosure requirement would "not necessarily harm those OSPs that charge relatively high rates, if they offer superior services . . . ." Second Further Notice, ¶36. The Commission cannot establish policy on the basis of "beliefs." There is substantial empirical data which indicates that smaller OSPs' rates are higher to provide the same service. Therefore, smaller OSPs cannot hope to justify higher rates by providing "superior service" when higher rates based on unavoidable costs already exist for similar service.

III. SPECIFIC ASPECTS OF THE "BENCHMARK RATE" APPROACH UNDERSCORE THE PROPOSAL'S CLEAR CONFLICT WITH THE RFA

The benchmark methodology proposed ignores several cost elements that are fundamental to determining rates in a competitive environment.[10] In addition, the formula underlying the proposal will provide the benchmark carriers with the opportunity to engage in anti-competitive conduct and predatory pricing.

A. The Benchmark Methodology is Weighted Against Small Business.

The Commission's proposed benchmark structure includes a consideration of six characteristics of 0+ calls.[11] But, among the call characteristics listed by the Commission are rate elements that should not affect rates because they do not affect underlying costs. Such elements include time of day and distance. Including these elements will force carriers to charge less during periods of heavy network traffic.[12] Moreover, consideration of these elements is contrary to the industry's growing reliance on nationwide flat rates. Rate elements which do not result from underlying OSP costs are inappropriate and unduly burdensome on small businesses.

On the other hand, the list of characteristics proposed by the Commission does not take into account the actual costs to compete, such as PIFs and commissions. These costs provide the

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[10] Second Further Notice, ¶26.

[11] See, Id. The Commission's benchmark structure includes the following call characteristics: "(1) how much live or automated operator assistance it requires; (2) whether the called number is entered by the caller; (3) the time of day; (4) whether it lasted for the initial minute only or whether it included subsequent minutes; (5) the distance covered; and (6) whose credit card is used." Id.

[12] For example, discounts occurring during the evening and night would force OSPs to give discounts during peak network traffic hours.

economic incentive that small carriers, in particular, need to offer in order to compete in the OSP marketplace. By failing to include these cost elements, the Commission's proposal further skews the competitive environment in a way adverse to small businesses.

B. The Benchmark Price Margin is Inadequate.

The Commission's permissible price margin is established at 15 percent. This addition is ostensibly to provide smaller OSPs with flexibility in setting their rates.[13] A price margin of 15 percent is simply not adequate to cover the differences in underlying costs. A proper level of variance, to provide needed pricing flexibility, is at least two to three times that of the Big Three Benchmark carriers.

C. The Benchmark Methodology Can Be and, Therefore, Will Be Abused.

Many additional problems defeating small business competition will result if the Commission establishes benchmarks at a level approximating the average price charged by the Big Three. Without meaningful inquiry and ignoring economic facts, the Commission leaps to the assumption that the rates of the Big Three represent those rates that consumers would expect to pay for operator services.[14] It is not surprising that this approach is but a self-fulfilling prophecy. If the Commission officially establishes the Big Three's rates as what consumers expect, what other result can be expected but that consumers will indeed accept their rates as the most reasonable. Such circuitous reasoning creates the antithesis of maintaining competition and of avoiding regulation which unduly and unfairly burdens small businesses.

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[13] Second Further Notice, ¶24.

[14] Id., ¶23.

IV. MANDATORY PRICE-DISCLOSURE OF 0+ CALLS IS REQUIRED.

In the Notice, the Commission states that complaints and misconceptions regarding alternative operator services have resulted in numerous complaints from consumers.[15] To reduce consumer complaints, an understandable goal of an already over-taxed bureaucracy, consumers should have the information needed to make an informed choice with regard to the various rates charged by operator service providers.

ACTA, therefore, supports the Commission's proposal to impose a requirement on all OSPs to orally disclose their rates to consumers when a call is placed.[16] A price-disclosure requirement or "rate brand" would ensure that consumers had adequate information with regard to the rates being charged by a particular OSP, thereby allowing them to make informed choices. As the Commission stated in its Notice, disclosure requirements would ensure that consumers do not unintentionally or inadvertently use carriers that charge unexpected high rates for interstate calls.[17] Consequently, a rate brand would dispel any misconceptions regarding the rates being charged by the presubscribed OSP.

A rate announcement would also give callers a frame of reference regarding OSP charges. Callers could obtain a better understanding of the rates typically charged by OSPs and this would assist consumers in their efforts to make more educated buying decisions. In turn, the ability of

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[15] Second Further Notice, ¶13.

[16] A rate brand requirement could immediately address many of the concerns prompting the implementation of BPP and at a much lower cost to consumers and carriers. Id., ¶37.

[17] Id., ¶36. Although the Commission discussed this issue in the context of a disclosure requirement for rates exceeding the benchmark, the same reasoning is applicable to a general disclosure requirement.

consumers to make informed choices and educated decisions regarding the operator services they are purchasing will result in more effective competition.

Importantly, from the small-business context, the costs associated with a disclosure requirement are minimal.[18] It is ACTA's understanding that OSPs already have the technology to allow for full disclosure at the time a call is made and prior to the time charges are incurred. Thus, a full price-disclosure would be the most effective and cost-efficient means by which to provide consumers with the information they need to select an OSP provider.[19]

A price-disclosure requirement on all 0+ calls will be sufficient to address the remaining concerns prompting the BPP proposal. Consumers receiving a rate brand could no longer claim that they were not aware of the rates being charged at the time a call was placed or that they inadvertently used an OSP whose rates were higher than expected. Thus, the rate brand solution would give consumers the information they need to take responsibility for the decisions they make in a competitive marketplace.[20]

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[18] The Commission is also seeking comments on "the benefits and costs associated with imposing a price-disclosure requirement on all 0+ calls." Id., ¶4.

[19] Id., ¶37 (requesting comments on disclosure requirements that would "represent more effective and efficient means for providing consumers with the information they need to make fully informed decisions regarding the choice of an OSP").

[20] There is ample evidence to support the notion that consumers are taking advantage of the choices available to them in the marketplace. In 1992, when BPP was first introduced, callers were not familiar with the access code dialing. As a result, many callers found dial-around to be burdensome and confusing. Second Further Notice, ¶7. In the current OSP marketplace, however, consumers are more familiar with access code dialing due to increased advertising and vanity access code numbers. Statistics indicate that in 1995, more than 50% of callers dialing 0+ calls dialed around the presubscribed OSP.

V. INFORMATIONAL TARIFFS

The Commission also solicited comments on whether it should exercise its new forbearance authority with respect to the filing of informational tariffs.[21] Section 226(h) of TOCSIA requires all interstate operator service providers to file and maintain informational tariffs.[22] Specifically, the Commission is seeking comment on whether this filing requirement is effective in putting consumers on notice of an OSP's rates.[23]

ACTA is aware that some OSPs agree with the Commission's conclusion that such tariffs are ineffective and administratively burdensome for many carriers and support a mandatory detariffing policy with regard to informational tariffs. ACTA believes the Commission is not focusing on the more important issues here. ACTA does not support mandatory detariffing of any service offerings for reasons already articulated in other proceedings (See, ACTA Comments in Docket No. 96-98).

Here, the issues affecting the lawfulness of mandatory detariffing raise similar concerns, plus a few others. Informational tariffs may not provide the best means of providing consumer information, but it is unquestionable that such tariffs are the only means by which consumers, competitors and regulatory bodies have any information about rates being charged.[24] Informational tariffs may be used and are the only means by which unscrupulous operators can be controlled

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[21] Second Further Notice, ¶10. TOCSIA also authorizes the Commission to waive the tariff requirement if certain conditions are met. Id.

[22] 47 U.S.C. §226(h)(1).

[23] Second Further Notice, ¶41.

[24] ACTA recognizes that mandatory price-disclosure will result in proving some information, but that system cannot effectively address all areas of concern.

should their price disclosures be inadequate or intentionally misleading. Further, given the tendency of the Big Three to act in their own vested interests, it is imperative that their rates be published and readily available. Finally, given the statutory mandate of TOCSIA, the Commission cannot merely assume that mandatory detariffing will serve the public interest. Specific and defensible findings are required -- findings ACTA does not believe can be made at this time.

VI. CONCLUSION

ACTA submits that the Commission must abandon those proposals which conflict with the goals inherent in the RFA and urges the Commission to act in accordance with the comments herein submitted. ACTA does support a price-disclosure requirement on all 0+ calls as a workable and inexpensive means by which to address the Commission's remaining consumer issues, but is opposed to mandatory detariffing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Suzanne M. Helein, a secretary in the law firm of Helein & Associates, P.C., do hereby state and affirm that copies of the "Initial Regulatory Flexibility Analysis Comments of America's Carriers Telecommunication Association ("ACTA")," in CC Docket No. 92-77, were hand-delivered to the following, on this 17th day of July, 1996:

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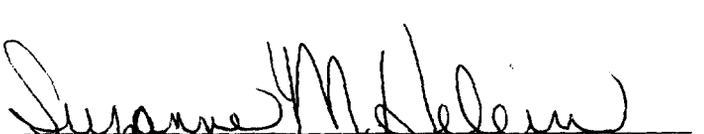

Suzanne M. Helein